



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO.: EG12CB-61264
REFERRAL AGENCY NUMBER:17E-2010-00181

Inger Stevens and
Gary LoCassio, Acting Director,
New Jersey Division on Civil Rights,
Complainants,
v.
Millburn Diner,
Respondent.

FINDING OF PROBABLE CAUSE

Pursuant to a Verified Complaint filed on February 8, 2010, the above-named respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, *et seq.*, and specifically within the meaning of N.J.S.A. 10:5-12(a).

The Verified Complaint was subsequently amended to reflect that Gary LoCassio (Acting Director) is the Acting Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant alleged that Respondent subjected her to unlawful discrimination based on her creed, Muslim, in violation of the LAD. Specifically, Complainant alleged that Respondent informed her she could not wear her khimar (religious head covering) at work and that she was discharged for not removing it.

SUMMARY OF RESPONSE

Respondent denied discriminating against Complainant for any unlawful reasoning including her creed. Respondent contended that it did not fire Complainant, but rather she quit. Specifically, Respondent asserted that Complainant was not wearing the required uniform in compliance with its acceptable workplace appearance, grooming and dress standards. Respondent explained that all employees are required to wear a blue button-down long sleeved shirt with a collar, black tuxedo pants, black vest, black socks and shoes. Respondent alleged that on February 3, 2010, its owner, Michael Pagonas, approached Complainant and asked why she was wearing a khimar. Respondent alleged that Mr. Pagonas asked Complainant to take it off or leave the restaurant. Respondent

alleged that Complainant advised Mr. Pagonas that her khimar was a part of her religious attire and if it was a problem, then this would be her last evening working at the Diner. Complainant left and did not return to Respondent's place of employment.

BACKGROUND

Respondent, Millburn Diner, is a diner located in Millburn, New Jersey.

Complainant, Inger Stevens, a resident of Orange, New Jersey, was hired by Respondent as a server on March 17, 2009.

Gary LoCassio is the Acting Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation revealed sufficient evidence to support a reasonable suspicion that Complainant was subjected to unlawful discrimination and discharged because of her creed, which is Muslim. More specifically, the investigation supported Complainant's allegation that she is Muslim, wearing a khimar is required by the tenets of her religion, and Respondent was not willing to allow Complainant to wear her khimar while working. Further, Respondent did not demonstrate that allowing Complainant to wear a khimar would impose an undue hardship on its business.

Complainant was hired by Respondent as a server on March 17, 2009, and it was undisputed that she performed her job at a level that met Respondent's legitimate expectations. Complainant contended that at all times before February 3, 2010, she wore a khimar while working at Respondent's diner without incident or objection by Respondent. According to Complainant, on February 3, 2010, Complainant was approached by Respondent's owner, Michael Pagonas, who asked her why she was wearing that "head gear" and requested her to take it off. Complainant stated that she advised Mr. Pagonas that she is Muslim and she is required to wear the khimar because of her religion. Complainant asserted that Mr. Pagonas then stated to Complainant that she could not wear the khimar and he did not care if it was a religious requirement. Pagonas further stated that this would be her last night working if she did not remove the khimar, to which Complainant replied that she would not take it off. According to Complainant, Mr. Paganos then stated, "Well, this is your last night working here." Complainant left and did not return to Respondent's place of employment.

Complainant's version of what transpired was supported by another employee at Respondent's diner. The investigator interviewed that employee, Radina Zaharie, who stated that she was present on the evening of February 3, 2010. Zahaire stated that Mr. Pagonas approached Complainant and asked her what that "head gear" was on her head. Zahaire further stated that Mr. Pagonas then told Complainant that she cannot work in his restaurant with "that thing" on her head. Zahaire indicated that Complainant replied, "It is called a khimar," and explained to Mr. Pagonas that it is required by her religion, which is Muslim. Zahaire stated that she then saw Complainant leave the premises. Zahaire also stated to the investigator that Complainant had been wearing the khimar at work prior to February 3, 2010.

On June 8, 2010, a fact finding conference was conducted in this matter. The assigned Investigator spoke with Complainant prior to the conference and requested that she wear the same attire to the conference that she wore on February 3, 2010. Complainant attended the conference wearing a khimar. At the start of the fact finding conference, the assigned Investigator asked Complainant to stand up and then asked Respondent's owner whether this was the same attire Complainant wore on February 3, 2010. Respondent's owner replied, "Yes," and went on to state, "this is my diner and no one would ever be allowed to work in my establishment with that type of head gear on." Respondent's owner further stated, "If someone came into my diner and was covered from head to toe in that gear, with their eyes only showing, they would not be working here." Mr. Pagonas stated that he had not seen Complainant wear the khimar prior to February 3, 2010.

Respondent's owner also alleged that Complainant did not have on the proper tuxedo pants, which all employees are required to wear. Complainant replied that Mrs. Pagonas (the owner's wife) was in the process of seeking a new vendor that carries large and extra large tuxedo pants, as their current vendor only carries small sizes. Mr. Pagonas confirmed Complainant's assertions concerning the pants. The investigator also spoke with Mrs. Pagonas, who confirmed that only the small sizes of the tuxedo pants were available at the time Complainant was employed. Mrs. Pagonas further stated that she is working on securing a vendor. Both Complainant and Mrs. Pagonas stated that prior to February 3, 2010, Complainant wore standard black pants without complaint. There is no dispute that complainant was willing to wear the uniform required by Respondent as soon as it provided pants that fit her.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40,56 (App. Div.1988), rev'd on other grounds, 120 N.J. 73 (1990), cert.den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218,226 (App.Div.1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

Complainant alleged Respondent failed to accommodate her religious beliefs or observances. In order to establish a prima facie case of this form of religious discrimination, an employee must show that she: (1) holds a sincere religious belief that conflicts with a job requirement; (2) informed her employer of the conflict; and (3) was disciplined for failing to comply with the conflicting requirement. EEOC v. The Geo Group, Inc., 616 F.3d 265, 271 (3d Cir. 2010). In the instant case, the Division's investigation disclosed that Complainant is a member of the Muslim faith which requires her to wear a khimar, she notified Respondent's owner of this requirement, and he advised her that she could not wear it while on the job. Accordingly, Complainant was able to meet the criteria for a prima facie case of creed discrimination.

Under the LAD, once this prima facie case of religious discrimination has been established, “the burden then shifts to the employer to show either (1) it made a good-faith effort to reasonably accommodate the religious belief; or (2) such an accommodation would work an undue hardship upon the employer and its business.” N.J.S.A. 10:5-12 (q)(1); See also The Geo Group, supra at 271; Shelton v. University of Med. & Dentistry of N.J., 223 F.3d 220, 224 (3d Cir. 2000). The term “undue hardship” is defined as “an accommodation requiring unreasonable expense or difficulty, or unreasonable interference with the safe or efficient operation of the workplace.” N.J.S.A. 10:5-12 (q)(3)(a). Factors to be considered are cost, including loss of productivity; the number of individuals who will need the particular accommodation for a sincerely held religious belief; and whether the accommodation will result in the employee being unable to perform the essential functions of her position. N.J.S.A. 10:5-12(q)(3)(a-c). See also Geo, supra at 273. The investigation here did not disclose any evidence that Respondent made an effort to reasonably accommodate Complainant’s religious belief. To the contrary, Mr. Pagonas declared that Complainant would not be allowed to work at its diner while wearing the khimar. Likewise, there was no evidence that allowing Complainant to wear a khimar would impose an undue hardship on Respondent. Indeed, the evidence indicates that Complainant had worn the khimar while working at Respondent’s diner for a significant period of time.

It should be noted that, while some courts have acknowledged that dress codes may be enforced under certain circumstances when they conflict with sincerely held religious beliefs, the standards for establishing undue hardship have been closely examined even where issues of public safety are involved. In EEOC v. Geo, supra, the Third Circuit Court of Appeals found that only where there is evidence of an actual preventable threat in allowing prison employees to wear khimars would it be permissible for the employer to refuse this accommodation. Id. at 273-275. The Geo court found that khimars could be used to hide weapons or other contraband, or even used themselves in attempts at strangulation, thus creating a genuine safety or security risk. Id. at 273-275. See also, Webb v. City of Philadelphia, 562 F.3d 256 (3rd Cir. 2009), where a dress code implemented by a police department that forbade the wearing of religious symbols, including khimars, was upheld, as Respondent had a “vital interest in maintaining its uniform as a symbol of neutral governmental authority, free from expressions of personal religion, bent or bias.” Id. at 261; Goldman v. Weinberger, 475 U.S. 503 (1986), where a United States Air Force policy prohibiting the wearing of a yarmulke was upheld for reasons of a perceived need for uniformity and discipline within the military.

Here, Respondent has made no argument relating to safety or security, or provided any other basis which would demonstrate that allowing Complainant to wear a khimar while working as a server would impose an undue hardship on its business operation. Therefore, the investigation produced sufficient evidence to find probable cause that Respondent’s refusal to allow Complainant to wear her khimar was in violation of the LAD.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

Date 9/16/11

Gary LoCassio
Gary LoCassio, Acting Director
New Jersey Division on Civil Rights